

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES  
and RICHARD L. BENEDICT,

Appellants,

v.

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 79-84

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal from the cancellation of a portion of  
artificially stored ground water permit No. G3-01280 (QB-43A) and the  
cancellation of artificially stored ground water permit No. G3-01280  
(QB-43B), having come on regularly for formal hearing on the 22nd and  
23d day of October, 1979, in Ephrata, Washington, and appellant  
Department of Natural Resources represented by J. Lawrence Coniff,  
Jr., Assistant Attorney General and appellant Benedict represented by  
his attorney, Richard E. Schultheis. and respondent, Department of

1 Ecology, appearing through Wick Dufford, Assistant Attorney General, .  
2 with Nancy E. Curington, hearing officer presiding, and the Board  
3 having considered the exhibits, records and files herein, and having  
4 reviewed the Proposed Order of the presiding officer mailed to the  
5 parties on the 22nd day of January, 1980, and more than twenty days  
6 having elapsed from said service; and

7 The Board having received no exceptions to said Proposed Order and  
8 the Board being fully advised in the premises; NOW THEREFORE,

9 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed  
10 Order containing Findings of Fact, Conclusions of Law and Order dated  
11 the 22nd day of January, 1980, and incorporated by reference herein  
12 and attached hereto as Exhibit A, are adopted and hereby entered as  
13 the Board's Final Findings of Fact, Conclusions of Law and Order  
14 herein.

15 DATED this 10th day of March, 1980.

16 POLLUTION CONTROL HEARINGS BOARD

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19 NAT W. WASHINGTON, Chairman

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21 CHRIS SMITH, Member

22   
23 DAVID AKANA, Member

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26  
27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER 2

CERTIFICATION OF MAILING

I, Trish Ryan, certify that I mailed, postage prepaid copies of the foregoing document on the 19th day of March, 1980, to each of the following-named parties at the last known post office addresses, with the proper postage affixed to the respective envelopes:

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Ephrata, WA 98823

Wick Dufford  
Assistant Attorney General  
Department of Ecology  
St. Martin's College  
Olympia, WA 98504

Lloyd Taylor  
Department of Ecology  
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Richard L. Benedict  
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Howard Isaacson  
Lands Manager, Lands Division  
Department of Natural Resources  
Public Lands Building  
Olympia, WA 98504

  
\_\_\_\_\_  
TRISH RYAN  
POLLUTION CONTROL HEARINGS BOARD

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
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NATURAL RESOURCES )  
AND RICHARD L. )  
BENEDICT, )

Appellants)

v. )

STATE OF WASHINGTON )  
DEPARTMENT OF )  
ECOLOGY, )

Respondent)

PCHB No. 79-84

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, an appeal from the cancellation of a portion of artificially stored ground water permit No. G3-01280 (QB-43A) and the cancellation of artificially stored ground water permit No. G3-01280 (QB-43B), came for formal hearing before the Pollution Control Hearings Board on October 22 and 23, 1979, in Ephrata, Washington. Board members present at the hearing include David Akana and Chris Smith, members. Nancy E. Curington presided.

EXHIBIT A

Appellant Department of Natural Resources (DNR) was represented by J. Lawrence Coniff, Jr., Assistant Attorney General. Appellant Benedict was represented by his attorney, Richard E. Schultheis. Respondent Department of Ecology (DOE) was represented by Wick Dufford, Assistant Attorney General.

Having considered the testimony, having examined the exhibits, and having considered the contentions of the parties, the Pollution Control Hearings Board makes these

#### FINDINGS OF FACT

##### I

Appellant DNR is the holder of Ground Water Permits No. G3-01280 (QB-43A) and No. G3-01280 (QB-43B) issued by DOE on March 17, 1975, which authorize DNR to appropriate artificially stored ground water from within the Quincy Ground Water Subarea and which require complete beneficial use of the water by March 11, 1978 on the North 1/2 of Section 36 lying southeasterly of state highway in T. 22 N., R. 26 E.W.M., and on the South 1/2 SE 1/4 lying Southeasterly of state highway in Section 36, T. 22 N., R. 26 E.W.M., respectively. Each permit allowed the use of 2000 gallons per minute, 700 acre feet per year, from March 1 to October 31 each year, for the irrigation of 200 acres. DNR did not object to the terms of the permits at the time of their issuance. Since it did not appear to respondent DOE that the development requirement had been satisfied on March 13, 1978, DOE gave notice to DNR that the permits would be cancelled unless DNR showed cause why the permit should not be cancelled. On May 9, 1978 DNR submitted a request for an extension of time to complete the project;

DOE granted an extension until April 1, 1979 to complete the project and put the water to full beneficial use. Almost a year later, on March 22, 1979, DOE gave notice to DNR that the permit would be cancelled unless DNR showed cause within sixty days from April 1, 1979 why the permit should not be cancelled. On March 28, 1979 DNR requested a one year extension in order to complete the project, and on May 4, 1979 DNR responded to the show cause order. DOE denied the request for a second extension on the basis of the public interest in developing and using the waters in question. Permit No. QB-43B (G3-01280) was cancelled in its entirety; Permit No. QB-43A (G3-01280) was amended to authorize 125 acres and cancel the 75 acres remaining on the permit. The order of partial cancellation of permit No. QB-43A and the order of total cancellation of Permit No. QB-43B are the subjects of this appeal.

## II

Upon receipt of Permit No. QB-43A and Permit No. QB-43B in March of 1975, DNR concentrated its efforts in an attempt to change the place of use of a public ground water permit (referred to as the "Treiber right") to the instant property. If DNR was successful in securing the transfer, it would avoid a license agreement with the Bureau of Reclamation and the required annual payment for the use of the water. That issue was resolved when DNR abandoned the "Treiber right" claim in early 1977. DNR was also concerned about a DOE order to backfill another DNR well, (The "East Cole Well") located elsewhere on property which DNR considered to be similar geologically to the

1 subject property. The matter involving the East Cole Well was  
2 resolved on March 30, 1978 when the Pollution Control Hearings Board  
3 issued its order, requiring the East Cole Well to be backfilled from  
4 its depth of 518 feet to 500 feet.

5 III

6 In March of 1977, DNR called for bids for well construction on the  
7 permitted properties; no bids were received. The project was rebid on  
8 July 14, 1977 and the well was completed on November 3, 1977, prior to  
9 the contract deadline date of November 15, 1977. The well was tested  
10 at 2100 gallons per minute (gpm) on November 30, 1977.

11 IV

12 While the Treiber right and the East Cole well matters were being  
13 resolved, DNR negotiated with the U.S. Bureau of Reclamation for an  
14 agreement to use artificially stored ground water. The agreements  
15 between DNR and the Bureau of Reclamation were reached in October of  
16 1976 and formalized on January 12, 1978. The DOE permit provisions  
17 require agreement with the Bureau before development commences.

18 V

19 In May of 1978 a proposed lease for the subject property was  
20 prepared and sent to the county auditor for posting for public  
21 auction. Appellant Benedict (hereinafter referred to as "Benedict"),  
22 the successful bidder, was awarded the lease at the auction; the lease  
23 was signed by the Commissioner of Public Lands and sent to Benedict on  
24 August 25, 1978.

25 VI

26 Benedict began working on the property on August 4, 1978, prior to

1 actual receipt of the lease, and on September 7, 1978 he applied for  
2 electric power service to the property. The power was connected to  
3 the pump site in March of 1979; water was first applied to the subject  
4 property at that time. At the time of the total cancellation of  
5 Permit No. QB 43B and the partial cancellation of Permit No. QB 43A  
6 (May 25, 1979), 100 acres were being irrigated pursuant to permit No.  
7 QB 43A. Fifteen to twenty-five additional acres were being prepared  
8 for irrigation and planting by removing the rocks from the property.  
9 Preparation of the remaining property had not yet begun.

#### 10 VII

11 The soil of the subject property consists of sandy loam beneath  
12 stony glacial outwash; rock removal is required prior to any  
13 agricultural production other than pasturage. The subject property is  
14 more rocky than 95-98% of the currently developed lands in the Quincy  
15 Basin Subarea. The winter of 1978-1979 was abnormally cold,  
16 preventing rock removal from the frozen ground for about three months

#### 17 VIII

18 Benedict installed a power line and pump sufficiently large to  
19 serve two irrigation circles. Benedict has not expended any other  
20 monies to develop the property covered by the partial cancellation of  
21 Permit No. QB-43A and the total cancellation of Permit No. QB-43B.  
22 Benedict estimates that complete preparation and irrigation of all of  
23 the subject property would not occur until 1981.

#### 24 IX

25 Any Conclusion of Law which should be deemed a Finding of Fact is



hereby adopted as such.

From these Findings, the Pollution Control Hearings Board comes to these

#### CONCLUSION OF LAW

##### I

The development schedule is one of several provisions of the permits. The schedule evidences a very rigid administrative policy found only in permits for artificially stored ground water. This policy, which is not found in any statute or regulation, was formulated by DOE in response to a high demand for a finite supply of water in the Quincy Sub-area and requires that water be placed to a beneficial use within a certain period of time. While the regulations do not expressly state that policy, the "fundamental basis" of the artificially stored ground water management program are expressly stated: 1) to insure that the Bureau of Reclamation has adequate supplies of water, and 2) to provide procedures to insure that the Bureau of Reclamation receives reasonable fees for its waters. WAC 173-134-060(3). Neither basis would be violated by the granting of the extension in this matter. Moreover, the rigid application of the permit condition does not, in itself, advance the fundamental basis of the management program. Thus, any modification of the permit development schedule should be judged in light of the facts of each case.

##### II

We conclude that DNR's actions with respect to the "Treiber" right and the East Cole Well situations are not persuasive reasons in

themselves to ignore the development schedule of the instant artificially stored ground water permits. These actions were calculated risks taken to avoid certain costs, which risks were assumed by DNR in an attempt to maximize revenue from development of the property rather than to develop the property in the most expeditious manner. However, the negotiations between DNR and the Bureau of Reclamation relating to the licensing agreement affect the permit itself. DNR commenced negotiations shortly after receiving the permits and continued until agreement was reached with the Bureau in October of 1976. There is nothing in the evidence to show that these were not good faith efforts. The terms of the DOE permits prevented DNR from commencing construction of the well before a license had been received. Thus in February of 1977, after agreement was reached, DNR constructed a well using due diligence, which well was completed on November 3 and tested on November 30, 1977. The permit development schedule was extended for one year by DOE in the spring of 1978. In May of 1978, the property was placed for public auction and a lease entered into on August 25, 1978. The lessee, Benedict, worked diligently to put water to a beneficial use on the property and succeeded as to 125 acres, or one circle. The lessee also installed electrical services and a pump capable of irrigating two circles with the expectation and intention of developing two circles. The evidence discloses no prejudice that would result to the management program if such additional time were allowed to appellants to install one more circle. We conclude that the opportunity to complete the development to the extent of the capability of the equipment already installed

1 should be preserved for a reasonable period of time. Accordingly, the  
2 DOE's decision is reversed and the matter is remanded for extension of  
3 the permit development schedule for a reasonable period of time, to be  
4 determined by the DOE, to develop the second irrigation circle. As to  
5 the remainder of the acreage in the permits, the DOE's action should  
6 be affirmed.

7 III

8 Any Finding of Fact which should be deemed a Conclusion of Law is  
9 hereby adopted as such.

10 From these Conclusions the Board enters this

11 ORDER

12 Department of Ecology order of cancellation of Ground Water Permit  
13 No. G3-01280 (QB 43B) and partial cancellation of Ground Water Permit  
14 No. G3-01280 (QB 43A) is reversed and remanded for further  
15 consideration and revision consistent with this decision.

16 DATED this 21<sup>st</sup> day of January, 1980.

17 POLLUTION CONTROL HEARINGS BOARD

18   
19 DAVID AKANA, Member

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21 CHRIS SMITH, Member  
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